TJAGSA Practice Notes

Faculty, The Judge Advocate General's School

The following notes advise attorneys of current developments in the law and in policies. Judge advocates may adopt them for use as locally published preventive law articles to alert soldiers and their families about legal problems and changes in the law. The faculty of The Judge Advocate General's School, U.S. Army, welcomes articles and notes for inclusion in this portion of *The Army Lawyer*; send submissions to The Judge Advocate General's School, ATTN: JAGS-DDL, Charlottesville, Virginia 22903-1781.

Family Law Note

The Child Support Recovery Act: Criminalization of Interstate Nonsupport

A man who refused to pay child support to his ex-wife was sentenced to sixty days in jail. The man was required to pay only twenty-five dollars a week to help care for his seven-year-old daughter, but he spent his money buying a classic Corvette and three boats.[1] In Massachusetts, a court upheld the conviction of Dr. Frank Bongiorno for not paying $220,000 in child support. As a result of the conviction, Bongiorno spent a year's worth of nights and weekends in federal prison, and the court ordered him to pay the child support he owed.[2] These are just two examples of how prosecutors have successfully used a federal criminal law against parents who failed to pay child support. The Child Support Recovery Act[3] (CSRA) is one of the ways Congress is attacking the poverty of single-parent families and the related welfare costs.

Traditionally, state law governs family law issues. At least forty-two states have criminal penalties for willful failure to pay child support.[4] Enforcement of these state statutes across state lines, however, is often frustrating, slow, and tedious. In 1992, Congress commissioned a study which concluded that at least five billion dollars a year in child support payments goes uncollected.[5] As a result of such studies and the need to reform the welfare system, Congress enacted the Child Support Recovery Act in 1992.

The CSRA makes it a federal crime to willfully fail to pay a past due support obligation owed to a child residing in another state.[6] The trigger for the statute is either a failure to pay a known court order of support for over one year or arrears in excess of $5000.[7] A first offense is subject to a fine and up to six months in prison.[8] Repeat offenders face a fine and up to two years in prison.[9] The statute also requires restitution of past due support amounts.[10] The CSRA does not require proof that a parent moved to another state with the intent to avoid payment of his support obligation.[11] The statute merely requires that a nonpaying parent live in a state different from the state where the child lives and that the parent willfully failed to pay a past due support obligation.[12]

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1. Charles W. Hall, *Judge Sentences Deadbeat Dad to Rare Jail Time*, WASH. POST, Feb. 7, 1996, at B1.

2. Patricia Nealson, *Court Says U.S. Can't Seize Wages for Child Support*, BOSTON GLOBE, Feb. 8, 1997, at B2.

3. 18 U.S.C.A. § 228 (West 1997).

4. United States v. Black, No. 96-3890, 1997 WL 549577, at *3 (7th Cir. Sept. 3, 1997).

5. H.R. Rep. No. 102-771, at 5 (1992). The House Judiciary Committee based this finding on a study of child support owed and collected in 1989. Specifically, it found that in 1989 only $11.2 billion of the $16.3 billion in support owed was collected. *Id.* Government assistance was required to fill the gap created by this shortfall. The same study concluded that interstate collection cases were particularly difficult. Over one-third of all uncollected support payments involved noncustodial parents living out of state. *Id.*

6. 18 U.S.C.A. § 228(d)(2). This section defines "State" to include the District of Columbia and any other possession or territory of the United States. There is no provision for the CSRA to apply to a parent or child residing in a foreign country.

7. 18 U.S.C.A. § 228(a).

8. *Id.* § 228 (b)(1). As a Class B misdemeanor, a first offense does not fall under the federal sentencing guidelines.

9. *Id.* § 228(b)(2). Repeat offenses subject the defendant to the federal sentencing guidelines. There is no listed offense for CSRA violations; therefore, courts look to the most analogous offense, which is theft.

10. *Id.* § 228(c).

11. United States v. Black, No. 96-3890, 1997 WL 549577, at *12 (7th Cir. Sept. 3, 1997).

12. *Id.*

Congress passed the CSRA pursuant to its power to regulate interstate commerce. Constitutional challenges to the CSRA ensued in almost every federal circuit. Nine federal circuit courts have found the CSRA constitutional.[13] Defendants alleged that the CSRA exceeds Congress' enumerated powers and violates the Tenth Amendment. All of the defendants relied on the United States Supreme Court case *United States v. Lopez*[14] for support of their commerce clause challenges. In *Lopez*, the Supreme Court found the Gun-Free School Zones Act unconstitutional[15] and set out three legitimate areas Congress can regulate under its commerce power: (1) the use of the channels of interstate commerce; (2) any instrumentality of interstate commerce, or persons or things in interstate commerce; and (3) activities substantially affecting interstate commerce.[16]

The circuit courts found that the CSRA arguably falls within all three *Lopez* categories, although they rely most often on the second category. Child support payments are debts owed, just like any other debt. When the parties to that debt live in different states, the debt becomes an instrumentality of interstate commerce.[17] Congress can regulate an instrumentality of interstate commerce as long as its regulatory action is reasonable and rationally related to a legitimate governmental interest.[18] All the circuits agree that there is a legitimate governmental interest in collecting delinquent child support, particularly child support collections which are hampered by interstate complications. Likewise, all the circuit courts found that the CSRA was reasonably adapted to its constitutional end. The Tenth Amendment argument fails once the court determines that Congress acted within its enumerated powers.[19]

One of the perceived advantages to CSRA actions by U.S. Attorneys was the subsequent civil action for collection of the restitution under the Federal Debt Collection Procedures Act (FDCPA).[20] The First Circuit recently found this practice unlawful in *United States v. Bongiorno*.[21] The court upheld Dr. Bongiorno's conviction under the CSRA for failure to pay over $200,000 in child support. The practice of the United States attaching wages under the FDCPA, however, failed the scrutiny of the court.[22]

The *Bongiorno* court held that child support arrears are not debts owed to the United States, which is a requirement under the FDCPA.[23] Courts use a two-question test to determine whether a debt falls under the FDCPA: (1) to whom is the debt owed? and (2) to whose benefit do the proceeds of the debt inure when paid?[24] Child support orders fail both prongs of the test. Child support payments are purely private debts owed between the individual parties, and the benefit of the payment inures most directly to the obligee and the child, not the United States.[25] Without the use of the FDCPA, however, former spouses must use state law methods of civil enforcement.

That is not to say that the United States cannot exert some control over collection of the restitution. Under the CSRA, res-

13. *See* United States v. Bongiorno, 106 F.3d 1027 (1st Cir. 1997); United States v. Sage, 92 F.3d 101 (2d Cir. 1996), *cert. denied*, 117 S. Ct. 784 (1997); United States v. Parker, 108 F.3d 28 (3d Cir. 1997); United States v. Johnson, 114 F.3d 476 (4th Cir. 1997); United States v. Bailey, 115 F.3d 1222 (5th Cir. 1997); *Black*, 1997 WL 549577; United States v. Crawford, 115 F.3d 1397 (8th Cir. 1997); United States v. Mussari, 95 F.3d 787 (9th Cir. 1996); United States v. Hampshire, 95 F.3d 999 (10th Cir. 1996), *cert. denied*, 117 S. Ct. 753 (1997). *Black*, the most recent circuit court case in this area, gives a detailed discussion of the commerce power issue and the Tenth Amendment issue. It is representative of the rulings by all of the circuits in this area. *See Black*, 1997 WL 549577 at *4.

14. 514 U.S. 549 (1995).

15. *Id.* at 567-68. The Gun-Free School Zone Act (GFSZA), 18 U.S.C.A. § 922, made it a federal offense for anyone knowingly to possess a firearm in a place that the person believed, or had reason to believe, was a school zone. The Court found that the GFSZA exceeded Congress' commerce power. *Id.* at 561. The Court found that the GFSZA had nothing to do with commerce or an economic enterprise. It also found that the GFSZA did not regulate an activity arising out of, or substantially affecting, interstate commerce. Finally, the Court found that the GFSZA contained no express jurisdictional element which limited its reach to interstate activity. *Id*.

16. *Id.* at 558.

17. *Black*, 1997 WL 549577, at *6.

18. *Id.* at *4.

19. *Id.* at *8.

20. 28 U.S.C.A. §§ 3001-3308 (West 1997). The FDCPA was enacted as part of the Crime Control Act of 1990, Pub. L. No. 101-647, 104 Stat. 4933 (1990).

21. 106 F.3d 1027 (1st Cir. 1997).

22. *Id.* at 1039.

23. *Id.* at 1039-40. The First Circuit is the only circuit to address this particular issue.

24. *Id.* at 1037.

25. The Department of Justice argued that the United States assumes the role of the obligee when collecting child support because of the financial burden placed on government assistance programs when support is not paid. The court did not agree that this was enough of a direct link to the debt or its proceeds, particularly since neither Mrs. Bongiorno nor her children received any government assistance.

titution is a part of the sentence.[26] Payment of restitution will be a condition of probation[27] or supervised release.[28] The government has several options for dealing with probation violations.[29]

Legal assistance attorneys should be aware of the CSRA and refer suitable cases to the U.S. Attorney's Office for the appropriate district.[30] Installations with an active Magistrate Court Prosecution program may have the ability to prosecute appropriate cases against soldiers or civilians using this law. Military attorneys, however, need to coordinate with the local U.S. Attorney's Office because Attorney General Reno issued guidance on processing CSRA cases.[31]

Legal assistance attorneys, while they should be aware of the CSRA and its uses, must be cautious not to threaten criminal prosecution as a means of gaining an advantage in a civil matter. Legal assistance attorneys should limit themselves to neutral statements of fact concerning possible criminal sanctions for failure to pay support, whether those sanctions fall under the Uniform Code of Military Justice[32] or the CSRA.[33] Major Fenton.

Consumer Law Note

Consumer Leasing Regulation May Be More Useful in Protecting Consumers

In late 1996, the Federal Reserve Board (FRB) published a new Regulation M (consumer leasing).[34] The new regulation is based upon growth in consumer leasing and changes to the Consumer Leasing Act (CLA).[35] Compliance with the new regulation was initially voluntary and was set to become mandatory on 1 October 1997.[36] This date was later extended to 1 January 1998.[37] All leases and lease advertising occurring after this date must comply with the new regulation. In addition, there is a new official staff commentary to the regulation.[38] Several aspects of the regulation and commentary may assist consumers and their attorneys in combating leasing abuses and violations. This note highlights a few of the more significant changes.[39]

Defining "Consumer Lease"

The regulation is limited to "consumer lease[s]."[40] A "consumer lease" is "a contract in the form of a bailment or lease for

26. 18 U.S.C.A. § 3556 (West 1997).

27. *Id.* § 3583.

28. *Id.* § 3563.

29. *See id*. § 3663.

30. The CSRA does not establish any venue restrictions. The Department of Justice will file cases in either the federal district in which the delinquent parent resides or the federal district in which the child resides.

31. Memorandum from Janet Reno, Attorney General, to All United States Attorneys (Feb. 25, 1997) (copy on file with author). The memorandum directs local U.S. Attorneys to coordinate with local child support enforcement agencies to establish guidelines for the referral of CSRA cases. Although the memorandum authorizes referral from private attorneys and citizens, it encourages U.S. Attorneys to require referral through the child support enforcement agency as an initial screening mechanism.

32. Nonpayment of court ordered child support violates *Army Regulation 608-99, Family Support, Custody and Paternity,* a punitive regulation. Violations of the regulation are punishable under Article 92 of the Uniform Code of Military Justice.

33. Neither the ABA Model Rules nor *Army Regulation 27-26* explicitly prohibit threatening criminal charges to gain an advantage in a civil matter. U.S. DEP'T OF ARMY, REG. 27-26, RULES OF PROFESSIONAL CONDUCT FOR LAWYERS (1 May 1992). Such action may, however, violate narrower provisions of those rules and should be avoided.

34. 61 Fed. Reg. 52,246-81 (1996); 62 Fed. Reg. 15,364 (1997). The final regulation is published at 12 C.F.R. pt. 213.

35. *See* Consumer Cred. Guide (CCH) ¶ 3700. The Consumer Leasing Act is codified as amended at 15 U.S.C.A §§ 1667-1667e.

36. 61 Fed. Reg. at 52,252.

37. "The Federal Reserve Board has delayed until January 1 the effective date of changes to its automobile leasing disclosure rules . . . . [L]ess than half of the 22,500 new-car dealerships that arrange for automobile leases have the software necessary to produce the new consumer disclosure forms required under the rule, the Fed said." Bill McConnell and Olaf de Senerpont Domis, *Capital Briefs: Fed Postpones Car Lease Disclosure Changes,* AM. BANKER, Sept. 29, 1997, at 2.

38. 62 Fed. Reg. at 16,054.

39. *See* NATIONAL CONSUMER LAW CENTER, TRUTH IN LENDING § 9.3a (3d ed. 1995, 1996 Supp.) [hereinafter TRUTH IN LENDING] (summarizing all of the changes).

40. *See* 12 C.F.R. §§ 213.1, 213.2 (1997).

the use of personal property by a natural person primarily for personal, family, or household purposes, for a period exceeding four months *and for a total contractual obligation not exceeding $25,000 . . . .*"[41] While this definition includes several limits, the one that causes the most consternation is the $25,000 cap. Many mobile home leases and leases for expensive cars often exceed this limit.[42] Since the term "total contractual obligation" is not defined in the regulation,[43] the $25,000 cap has been the source of much litigation. The lessor usually wants more items included in the "total contractual obligation" in order to get over the $25,000 cap and avoid the requirements of the regulation. To stay under the cap, the lessee wants to include fewer items.

The new official staff commentary to the definition of "consumer lease" attempts to clarify. The FRB explains:

> The total contractual obligation is not necessarily the same as the total of payments . . . . [It] includes nonrefundable amounts a lessee is contractually obligated to pay to the lessor, but excludes items such as: i. Residual value amounts or purchase-option prices; ii. Amounts collected by the lessor but paid to a third party, such as taxes, license and registration fees.[44]

This explanation should help many transactions fit under the $25,000 cap.

Motor Vehicle Leases

Another significant change (and perhaps the most significant substantive change) is a new subparagraph to 12 C.F.R. § 213.4 which applies only to motor vehicle leases.[45] Under this section, the lessor must show a number of items used to calculate the monthly payment amount,[46] and the disclosures must be made in a box that is segregated from the rest of the lease.[47]

The first disclosure is the key to this provision. The lessor must disclose "gross capitalized cost," which is defined as "the amount agreed upon by the lessor and the lessee as the value of the leased property and any items that are capitalized or amortized during the lease term, including but not limited to taxes, insurance, service agreements, and any outstanding prior credit or lease balance."[48] In other words, the gross capitalized cost is the value of the vehicle plus anything paid for during the lease term. This is significant because the regulation requires the lessor to provide the consumer with a complete itemization of the gross capitalized cost *upon request*.[49] If the consumer makes such a request, the lessor must provide the itemization prior to the signing of the lease.

Consumers should *always* request the itemization for two reasons. First, it will reveal to the consumer the "hidden" costs in the lease, such as dealer profit, service contracts, kickbacks, and acquisition costs.[50] Second, it will provide valuable information to a legal assistance attorney should a dispute arise concerning the lease.

Another significant disclosure is the "residual value." This is defined as "the value of the leased property at the end of the lease term, as estimated or assigned at consummation by the lessor, used in calculating the base periodic payment."[51] Note that the value is estimated or assigned by the lessor; it is not regulated by the FRB. The official staff commentary, however, does require that:

> [T]he estimate of the residual value must be reasonable and based on the best information reasonably available to the lessor. A lessor

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41. *Id.* § 213.2(e)(1) (emphasis added).

42. *See* TRUTH IN LENDING, *supra* note 39, § 9.2.2.

43. *See* 12 C.F.R. § 213.2.

44. *Id.* pt. 213, supp. I (official staff commentary).

45. *Id.* § 213.4(f).

46. *Id.* There are 11 required disclosures: (1) gross capitalized cost; (2) capitalized cost reduction; (3) adjusted capitalized cost; (4) residual value; (5) depreciation and any amortized amounts; (6) rent charge; (7) total of base periodic payments; (8) lease term; (9) base periodic payment; (10) itemization of other charges; and (11) total periodic payment. *Id.*

47. *Id.*

48. *Id.* § 213.2(f).

49. *Id.*

50. *See Finding Leasing Violations Under New Reg. M*, 16 NCLC REPORTS, CONSUMER CREDIT & USURY EDITION (Nat'l Consumer L. Ctr.), July/Aug. 1997, at 25; *FRB Issues New Rules for Consumer Leasing*, 15 NCLC REPORTS, CONSUMER CREDIT & USURY EDITION (Nat'l Consumer L. Ctr.), July/Aug. 1996, at 2.

51. 12 C.F.R. § 213.2(n).

> should generally use an accepted trade publication listing estimated current or future market prices for the leased property unless other information or a reasonable belief based on its experience provides the better information.[52]

The residual value is used in several critical calculations, including the base periodic payment. It is also excluded from the total contractual obligation when determining whether the CLA applies to the transaction. Thus, the lessor has a number of reasons to assign a low residual value at the beginning of the lease.[53] Consumers should check this value and compare it to trade publications prior to signing the lease to ensure that the value is reasonable.

The final disclosure worthy of note is the "total of payments." This disclosure is new to leasing and should not be confused with the "total of base periodic payments," which must also be disclosed.[54] The "total of payments" is "the sum of the amount due at lease signing (less any refundable amounts) [and] the total amount of periodic payments (less any portion of the periodic payment paid at lease signing) . . ." plus any "other charges payable to the lessor . . . that are not included in the periodic payments."[55] This disclosure will, therefore, inform consumers of the total amount of money they are actually spending. Hopefully, it will enable them to make an informed decision about entering into the transaction.

Conclusion

As part of the Truth in Lending Act, the CLA is aimed at providing information to consumers so that they can make informed decisions. The recent changes in Regulation M and the official staff commentary go a long way in requiring lessors to provide the information that consumers need to make good choices regarding leases—particularly for automobiles. Legal assistance attorneys should distribute this information in their preventive law programs and use it effectively in their practice. Automobile leases are becoming increasingly popular,[56] and this trend will most likely result in an increase in the leasing cases seen by legal assistance attorneys. As a result, the CLA will join a number of other federal protections as an integral part of legal assistance practice. Major Lescault.

Legal Assistance Reserve Note

Interpreting USERRA "Mixed Motive" Discrimination Cases

As one of the first cases reported under the Uniformed Services Employment and Reemployment Rights Act (USERRA),[57] *Robinson v. Morris Moore Chevrolet-Buick, Inc.*[58] is instructive as to how this new law works. In *Robinson*, the Court of Appeals for the Fifth Circuit illustrates the major differences between the USERRA and its predecessor, the Veterans Reemployment Rights Act.[59]

Clinton Robinson was a used car salesman for the defendant. In February 1996, Robinson notified his supervisor that he had to attend a mandatory military physical examination with his Army Reserve unit on 23 February 1996 and would be absent from work that day. The car dealership was planning an important sales event that day, and the supervisor asked Robinson if his attendance at the physical examination was mandatory. Robinson said that he was not sure, and the supervisor contacted the Reserve unit and confirmed that Robinson's attendance was required and that he had no discretion to choose a different time to take his physical examination. Even though the supervisor released Robinson to attend his military physical examination on 23 February, the defendant fired Robinson on 29 February 1996.[60] Claiming that he had been fired for fulfilling his Army Reserve obligations, Robinson filed suit under the USERRA.[61]

In its motion for summary judgment, the defendant claimed that it had sufficient justification to fire Robinson for nondiscriminatory reasons, including tardiness, poor sales performance, and unexcused work absences.[62] The employer submitted sworn affidavits from a supervisor who alleged poor

52. *Id.* pt. 213, supp. I (official staff commentary).

53. TRUTH IN LENDING, *supra* note 39, § 9.3a.6.15.6.

54. *Id.* at § 9.3a.6.15a.

55. 12 C.F.R. § 213.4(e).

56. The media reports that three million automobiles were leased in 1996, which accounted for approximately one-third of all new automobiles. *See, e.g.*, Gene Tharpe, *Opinions Vary Widely About Leasing an Auto: Experts Debate the Advantages, Pitfalls*, ATLANTA J.-CONST., Feb. 17, 1997, at E-2.

57. Uniformed Services Employment and Reemployment Rights Act, Pub. L. No. 103-353, 108 Stat. 3150 (1994), *codified at* 38 U.S.C. §§ 4301-33 (1994).

58. Robinson v. Morris Moore Chevrolet-Buick, Inc., 974 F. Supp. 571 (E.D. Tex. 1997).

59. Pub. L. No. 93-508, § 404(a), 88 Stat. 1596 (1974), *previously codified at* 38 U.S.C. §§ 2021-27 (1988).

60. *Robinson*, 974 F. Supp. at 572.

work performance and repeated tardiness and unexcused absences. Robinson's previous employer indicated that Robinson had quit his job because of unexcused absences and unhappiness with selling cars. Robinson responded that his supervisor, Mr. Croker, was extremely angry with his work absence to attend his military physical examination. Robinson pointed out that he was selling well and had never been disciplined or counseled prior to requesting time off to attend his military physical examination. He added that his work performance had not been criticized by the car dealership until after his absence for his physical examination.[63]

Noting that neither the Fifth Circuit nor the United States Supreme Court had heard a USERRA "mixed motive"[64] discrimination claim, the court looked to USERRA discrimination cases in other circuits. The court adopted the Second Circuit's "motivating factor" test and "but-for" employment discrimination analysis.[65] Under the motivating factor test, the plaintiff must show, by a preponderance of the evidence, that his military position or obligation was a motivating factor in the employer's decision to fire him. If an employee's military position was a motivating factor for the adverse action, the employer's action is improper.[66] The Fifth Circuit explained that the employer must do more than show that it was motivated in part by a legitimate reason to discharge or to discipline; it must that show its legitimate reasons would, standing alone, be sufficient to justify its adverse employment decision.[67]

The court reviewed the evidence presented on the summary judgment motion and found that Robinson laid out a sufficient chronology of facts, including the extremely close proximity of his Army Reserve obligation to the date of his firing and the dealership's complaints about his poor attendance (which may have also been related to Reserve duty absences). Viewing the evidence in the light most favorable to Robinson (the non-moving party), the court found that the defendant had made no complaints about Robinson's work performance prior to his absence to attend his physical examination.

In its motion for summary judgment, the defendant relied on a Seventh Circuit case which predated the USERRA. That case, *Pignato v. American Trans Air, Inc.*,[68] held that the mere existence of mixed motives is not enough to establish employer liability.[69] The Fifth Circuit, however, found *Pignato* unpersuasive for several reasons: (1) it was not a summary judgment decision;[70] (2) it relied on pre-USERRA cases, which held that plaintiffs must prove military status discrimination was the sole reason for adverse employer action;[71] and (3) the facts in *Pignato* were not similar to those in *Robinson*.[72] Unlike the plaintiff in *Pignato*, Robinson did not attempt to create job conflicts,

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61. Robinson filed suit under Section 4311 of the USERRA, alleging discrimination because of military duty. Section 4311 states:

> (a) A person who is a member of . . . a uniformed service shall not be denied initial employment, reemployment, retention in employment, promotion, or any benefit of employment by an employer on the basis of that membership . . . .
> (b) An employer may not discriminate in employment against or take any adverse employment action against any person because such person . . . has exercised a right provided for in this chapter . . . .
> (c) An employer shall be considered to have engaged in actions prohibited—
> (1) under subsection (a) [of the USERRA], if the person's . . . service . . . in the uniformed services is a motivating factor in the employer's action, unless the employer can prove that the action would have been taken in the absence of [such service] . . . .

38 U.S.C.A. § 4311 (West 1997).

62. *Robinson*, 974 F. Supp. at 573.

63. *Id.*

64. *Id.* at 575. "Mixed motive" refers to employment discrimination cases where the employer alleges a valid reason to discharge or discipline an employee, and the employee raises an impermissible basis for the employer to discharge or to discipline the employee.

65. *Id.* at 575-76, n.1. *See* Gummo v. Village of Depew, 75 F.3d 98, 106 (2d Cir. 1996), *cert. denied*, 116 S. Ct. 1678 (1996). The *Gummo* court confirmed that USERRA plaintiffs no longer have to prove that military status discrimination was the sole cause for their discharge, as was required under prior caselaw. Some good examples of the pre-USERRA "sole cause" requirement can be found in: *Monroe v. Standard Oil Co.*, 452 U.S. 549 (1981); *Sawyer v. Swift & Co.*, 836 F.2d 1257 (10th Cir. 1988); and *Clayton v. Blachowske Truck Lines, Inc.*, 640 F. Supp. 172, 174 (D. Minn. 1986), *aff'd*, 815 F.2d 1203 (8th Cir. 1987). The *Clayton* court held that to avoid summary judgment, the plaintiff must provide "evidence which raises an inference that his reserve status was the sole motivation behind his termination." *Clayton*, 640 F. Supp. at 174.

66. *Robinson*, 974 F. Supp. at 576.

67. *Id.*

68. 14 F.3d 342 (7th Cir. 1994) (holding that in order to establish employer liability in mixed motive cases, the impermissible motive must be the controlling reason for the adverse action).

69. *Robinson*, 974 F. Supp. at 577.

70. *Id.* at 577-78.

71. *Id.; See supra* note 65 and accompanying text.

lie to his supervisors to get off work, or deliberately violate company policies.[73]

Robinson's employer failed to provide convincing evidence that Robinson's work performance would have justified firing him, without considering his absence for his military physical on 23 February 1996. The court further found that the employer failed to prove a nondiscriminatory motivation for the firing, which left a material issue of fact unresolved.[74] Thus, summary judgment was not appropriate.

In *Robinson*, the Fifth Circuit illustrates two of the biggest changes the USERRA made in military discrimination cases. First, plaintiffs now have a reduced burden of proof under the motivating factor test. Second, the USERRA makes it tougher for employers to obtain summary judgment in mixed motive cases. Lieutenant Colonel Conrad.

Administrative Law Note

Mental Health Evaluations

Specialist (SPC) Strained is taking up more and more of his commander's time. He started out well with his unit, but he soon developed a reputation as a malcontent. Not satisfied with mere griping, he seems to find out about—and use—every complaint mechanism known to soldiers, including the installation's dial-the-CG line, Inspector General complaints, Equal Opportunity complaints, and Article 138 complaints. Most of the complaints are unfounded, and the commander feels they are getting more and more bizarre. The commander is considering having SPC Strained evaluated by a psychiatrist or other mental health professional to see if there is a medical or psychological reason for SPC Strained's perception that everyone is out to get him. The company commander calls you, as a legal advisor, to discuss options for dealing with this soldier. Your instinct is to get as much information as possible, so you start to say, "Sure, go ahead and send Strained right in for a psych eval, and then let's talk."

Stop. That's bad advice. The company commander should not proceed with a mental health evaluation for SPC Strained just yet.

Background

The National Defense Authorization Acts for Fiscal Years 1991[75] and 1993[76] mandated procedures for commanders to use in referring members of the armed forces for mental health evaluations. The Department of Defense (DOD) issued implementing guidance[77] which attempts to balance protections for service members with a commander's responsibility to be alert to those who pose a danger to themselves or to others. Depending on the circumstances, failing to comply with this guidance may be punishable as a violation of Article 92, Uniform Code of Military Justice.[78]

The Army plans to issue implementing guidance in the next revision or change to *Army Regulation 600-20, Army Command Policy*, but has not done so to date.[79] The Army has issued interim guidance by electronic message.[80]

Routine Referrals

Before a commander may refer a soldier for a routine (non-emergency) mental health evaluation, the commander must consult with a military mental health care provider.[81] The commander must discuss with the mental health care provider the soldier's "actions and behaviors that the commander believes warrant the evaluation."[82] The provider may recommend routine or emergency evaluation.[83] If no mental health care pro-

72. *Robinson*, 974 F. Supp. at 577-78.

73. *Id.*

74. *Id.* at 578.

75. Pub. L. No. 101-510, § 554, 104 Stat. 1485, 1567-69 (1990).

76. Pub. L. No. 102-484, § 546, 106 Stat. 2315, 2416-19 (1992) (pertinent portions codified at 10 U.S.C. § 1074).

77. U.S. DEP'T OF DEFENSE, DIR. 6490.1, MENTAL HEALTH EVALUATIONS OF MEMBERS OF THE ARMED FORCES (14 Sept. 1993). This directive has been superseded. *See* U.S. DEP'T OF DEFENSE, DIR. 6490.1, MENTAL HEALTH EVALUATIONS OF MEMBERS OF THE ARMED FORCES (1 Oct. 1997) [hereinafter DOD DIR. 6490.1]; U.S. DEP'T OF DEFENSE, INSTR. 6490.4, REQUIREMENTS FOR MENTAL HEALTH EVALUATIONS OF MEMBERS OF THE ARMED FORCES (28 Aug. 1997) [hereinafter DOD INSTR. 6490.4].

78. DOD DIR. 6490.1, *supra* note 77, at para. D.3.d.

79. *See, e.g.*, Message, 080700Z Mar 96, Headquarters, Dep't of Army, DAPE-HR-L, subject: Mental Health Evaluations (Clarification) (ALARACT 21/96), para. 8 (8 Mar. 1996) [hereinafter ALARACT 21/96].

80. *Id. See also* Message, 141300Z Nov 95, Headquarters, Dep't of Army, DAPE-HR-L, subject: Mental Health Evaluations (ALARACT 087/95) (14 Nov. 1995) (superseded by ALARACT 21/96).

81. *Id.* at para. D.2.b; DOD INSTR. 6490.4, *supra* note 77, at para. F.1.a(2).

vider is available, the commander must consult with a physician or "the senior privileged non-physician [health care] provider present."[84] The command must follow up this consultation with a written request for evaluation which recaps the basis for the request.[85]

In addition to consulting with a mental health care professional, the commander must give the soldier written notice of the referral at least two duty days before the evaluation.[86] The notice must include a "brief factual description of the behaviors and/or verbal communications that led to the commanding officer's decision to refer the [soldier] for mental health evaluation," the name of the provider consulted, notification of the soldier's rights,[87] the details of the scheduled evaluation, and "[t]he titles and telephone numbers of other authorities, including attorneys, Inspectors General, and chaplains, who can assist the service member who wishes to question the necessity of the referral."[88] The commander must sign the notice and give copies to the soldier and the health care provider who will be conducting the evaluation.[89] If the soldier requests advice from an attorney, a judge advocate or DOD-employed attorney must be appointed.[90] If an attorney is "not reasonably available" for face-to-face consultation, legal consultation by telephone will suffice.[91]

When the soldier reports for the mental health evaluation, the health care provider must review the referral documents. If the health care provider believes the commander made the referral in violation of *DOD Directive 6490.1* or *DOD Directive 7050.6*[92] (as an improper retribution for a whistleblower complaint), the provider must inform the referring commander's next higher commander.[93]

Note that under current Department of the Army (DA) policy, these procedures apply only to referrals for mental health evaluations made at the commander's own initiative. They *do not* apply to:

> Patient self-referrals;
>
> Referrals that are a function of routine diagnostic procedures and made by health care providers not assigned to the service member's command;
>
> Referrals to family advocacy programs;
>
> Referrals to drug and alcohol rehabilitation programs;
>
> Referrals to mental health professionals for routine evaluations as required by other DA regulations [ARs] (e.g., *AR 635-200* and *AR 135-178*, enlisted administrative separations);
>
> Referrals related to responsibility and competence inquiries conducted pursuant to . . . Rule for Courts-Martial 706 (i.e., sanity board evaluations);
>
> Referral for mental health evaluation required (pursuant to *AR 380-67*) for certain duties (e.g., security clearance evaluations, personnel reliability programs, etc.).[94]

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82. DOD INSTR. 6490.4, *supra* note 77, at para. F.1.a(2).

83. *Id.*

84. *Id.*

85. *Id.*

86. *Id.* para. F.1.a(4).

87. The 1993 Defense Authorization Act granted service members who are referred for mental health evaluation the following rights: the advice of an attorney; the right to complain to an Inspector General, if the service member believes the referral was made in retaliation for a protected whistleblower communication; the right to a second opinion by a mental health professional of the service member's own choosing (including a non-DOD mental health professional, at the member's expense); and the right to communicate without restriction with an Inspector General, attorney, member of Congress, and others about the mental health evaluation. National Defense Authorization Act for Fiscal Year 1993, Pub. L. No. 102-484, § 546, 106 Stat. 2315, 2416-19 (1992) (codified at 10 U.S.C. § 1074). If a commander cannot comply with the procedural requirements due to military necessity, the service member has the right to know why. *Id. See also* DOD INSTR. 6490.4, *supra* note 77, encl 4.

88. DOD INSTR. 6490.4, *supra* note 77, para. F.1.a(4)(a).

89. *Id.* paras. F.1.a(4)(a)(6), F.1.a(4)c.

90. *Id.* para. F.1.b.

91. *Id.*

92. U.S. DEP'T OF DEFENSE, DIR. 7050.6, MILITARY WHISTLEBLOWER PROTECTION (12 Aug. 1995).

93. DOD INSTR. 6490.4, *supra* note 77, para. F.1.c.

Emergency Referrals

A commander should refer a soldier for emergency mental health evaluation if the soldier, by word or action, shows that he or she is likely to cause serious injury to himself, herself, or others.[95] The commander must still consult with a mental health care provider either before transporting the soldier to the health care facility, if possible, or shortly thereafter, if circumstances do not permit prior consultation.[96] The decision to admit the soldier to a psychiatric or medical facility for evaluation is a clinical decision; only a credentialed health care provider can make that decision.[97] The commander must provide the soldier with the written notice described in the routine referral section above as early as possible.[98] A military medical treatment facility cannot hold a soldier for involuntary psychiatric hospitalization without a valid clinical diagnosis by a field-grade mental health care provider appointed by the medical treatment facility commander.[99]

Practice Implications

This area of law imposes responsibilities on commanders and military mental health care professionals, and potential patients have certain rights. Judge advocates who support commanders or health care providers should ensure that they and those whom they advise understand these responsibilities. Judge advocates should also be prepared to explain the policy to individual soldiers who may consult them to explain or to challenge a referral for mental health evaluation. Major Garcia.

94. ALARACT 21/96, *supra* note 79, para. 6. *See also* DOD DIR. 6490.1, *supra* note 77, para. D.3.e.

95. DOD DIR. 6490.1, *supra* note 77, para. D.2.c(1); DOD INSTR. 6490.4, *supra* note 77, para. F.1.a(5)(a).

96. DOD DIR. 6490.1, *supra* note 77, para. D.2.c(2); DOD INSTR. 6490.4, *supra* note 77, para. F.1.a(5)(b and e).

97. DOD DIR. 6490.1, *supra* note 77, para. D.2.e; *see also id.* para. D.5.b.

98. DOD INSTR. 6490.4, *supra* note 77, para. F.1.a(5)(d).

99. *Id.* para. F.2.c(1).